E.5
3/31/95
(signed)

FILED
MAR 31 1995
144644

STUART J. O'HARE
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CERRO COPPER PRODUCTS CO.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**NO: 92-CV-0204-PER**
	)	
MONSANTO COMPANY,	)	
	)	
Defendant.	)	

14

MEMORANDUM AND ORDER

RILEY, District Judge:

This matter comes before the Court on three pending motions: Defendant Monsanto Company's Motion for Summary Judgment as to Counts I, II, and III (Doc. 81); Monsanto's Motion for Summary Judgment as to Counts IV and V (Doc. 84); and Monsanto's Motion for Summary Judgment as to Counts I and II (Doc. 128).

A. Background

Viewing the evidence and the reasonable inferences therefrom in the light most favorable to the non-movant, Plaintiff Cerro Copper Products Company (Cerro), ***Tregenza v. Great American Communications Co.*, 823 F. Supp. 1409, 1411 (N.D. Ill. 1993)**, the record reveals the following. Beginning in 1927, Cerro owned and operated a plant in the Village of Sauget. Immediately to the north of Cerro's plant, separated by railroad tracks, is Monsanto's William G.

149

Krummrich plant. Monsanto uses the Krummrich plant for the manufacture and refinement of many organic and inorganic chemicals. Monsanto also produced polychlorinated biphenyls (PCBs) from approximately 1935 through 1977. Monsanto was the only producer of PCBs in the United States.

Dead Creek was a body of water located in St. Clair County, Illinois. Portions of Dead Creek lay on either side of the railroad tracks on both Monsanto's and Cerro's property. In 1924, the Village of Monsanto, now called the Village of Sauget, installed a 36 inch pipe to connect Dead Creek waters under the railroad tracks. In 1933, the Village built a sewer line, running east to west under a portion of the Krummrich Plant, to carry industrial waste and storm water from various commercial entities and residential homes. Shortly thereafter, Monsanto built a plant sewer system and connected it to the Village sewer line. Through its newly constructed sewer line, Monsanto disposed of industrial waste into the Village sewer line. In 1935, Monsanto filled in the portion of Dead Creek that lay on its property. The 36 inch line remained open toward the portion of Dead Creek which lay on Cerro's land (Dead Creek Sector A or DCA).

In 1939, the Village connected the 36 inch line still open to DCA to the Village sewer system. This use of the 36 inch pipe allowed Dead Creek to serve as a surge pond for the Village sewer system. When the flow in the Village sewer system exceeded its capacity, usually during storms, the excess flow (including the industrial effluent) discharged into DCA. Much of this industrial effluent came from the Krummrich plant. However, in 1986, Monsanto installed a 46 inch sewer to dispose of all of its industrial waste water instead of putting it in the Village sewer. During storms, runoff from the Cerro plant was also diverted into DCA.

In May of 1980, the Illinois Environmental Protection Agency (IEPA) began to investigate the contamination of Dead Creek. After publishing several studies and conducting

meetings, the IEPA, in July 1985, issued a Record of Decision (ROD) regarding Dead Creek. The ROD proposed a comprehensive feasibility study (FS).for Dead Creek and recommended retaining Ecology and Environmental Inc. (E&E). In September 1985, the IEPA retained E&E to conduct an FS for various sites, including DCA. During the course of E&E's investigation, the IEPA kept the public informed of the proceedings in Sauget.

In May 1988, E&E issued its report. The E&E report found that DCA was highly contaminated. In addition, this highly contaminated water was filtering into the groundwater beneath DCA and flowing away from DCA in all directions. The report warned that this presented "potential health hazards to the public in the area."

Cerro, recognizing this danger, set out to clean up DCA. Pursuant to this goal, Cerro retained the Avendt Group, Inc. (Avendt) to perform a site investigation and remedial alternatives evaluation of DCA and a feasibility analysis of DCA. Avendt's study was completed in June 1990. On July 5, 1990, a complaint was filed and a Consent Decree was entered into by Cerro and the State of Illinois. The Consent Decree required Cerro to conduct the clean-up action recommended by the Avendt study. Cerro began the clean up of DCA on July 16, 1990, and completed the project on November 26, 1990. The project cost Cerro Twelve Million Eight Hundred Thirty Six Thousand Six Hundred Nine Dollars ($12,836,609).

This action arises out of Cerro's clean up of DCA. Cerro filed a five-count complaint against Monsanto. Counts I and II seek to recover the clean-up costs under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), **42 U.S.C. § 9607**. Count III requests contribution from Monsanto under Section 113(f) of CERCLA, **42 U.S.C. § 9613(f)**. Count IV alleges that Monsanto is liable for the clean-up costs based on

Illinois common law concerning ultrahazardous activity. Count V alleges the Illinois common law tort of private nuisance. Monsanto has filed motions for summary judgment as to all five counts.

B. Standard of Review

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." **Fed. R. Civ. P. 56(c)**. The movant (here Monsanto) bears the burden of establishing the absence of fact issues and entitlement to judgment as a matter of law, and all doubts are to be resolved in favor of the non-movant. ***Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984)**. If the party moving for summary judgment "does not discharge that burden then he is not entitled to judgment." ***Id.*** If the movant does meet this burden, the non-moving party must then set forth specific facts through affidavits or other materials that demonstrate disputed material facts. ***Prochotsky v. Baker and McKenzie*, 966 F.2d 333, 334 (7th Cir. 1992)**. "The simple assertion that a factual dispute exists cannot defeat a motion for summary judgment." ***Id.***

In reviewing a summary judgment motion, the court does not determine the truth of the asserted matter but rather decides whether there is a genuine factual issue for trial. ***Harms v. Godinez*, 829 F. Supp. 259, 261 (N.D. Ill. 1993)**. In making this determination, "the entire record is considered with all reasonable inferences drawn in favor of the non-movant and all factual disputes resolved in favor of the movant." ***Tregenza*, 823 F. Supp. at 1411**.

C. Counts I & II: CERCLA Section 107

In Counts I and II, Cerro seeks recovery for the clean-up costs under Section 107 of CERCLA, **42 U.S.C. § 9607(a)**. Simply put, Cerro's cause of action is not a cost recovery action under Section 107. It is a contribution claim under Section 113(f) of CERCLA, **42 U.S.C. § 9613(f)**.

CERCLA provides two different causes of action by which parties can recover their clean-up costs. These are (1) cost recovery under Section 107, and (2) contribution under Section 113. ***United States v. Colorado and Eastern RR*, Nos. 94-1041, 93-1422, 1995 WL 115720, at *3 (10th Cir. March 17, 1995)**. These two kinds of actions are distinct and do not overlap. ***United Technologies Corp. v. Browning Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994)**, *cert. denied*, **151 S. Ct. 1176 (1995)**. Whenever "the gist of [a plaintiff's] claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible ... [t]hat is a quintessential claim for contribution." ***Akzo Coatings, Inc. v. Aiger Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)**. Regardless of the label used to define its claim, if the plaintiff is a responsible party, the case is controlled by Section 113(f). In that case, proceeding under Section 107 is an error. ***Akzo Coatings*, 30 F.3d at 764; *United Technologies Corp.*, 33 F.3d at 103; *Colorado and Eastern Railroad*, 1995 WL at *5.**[1]

---

[1] Cerro cites a series of decisions in which the Seventh Circuit allowed a responsible party to file a Section 107 cause of action against another responsible party. See ***Kerr-McGee Chemical v. Lefton Iron and Metal*, 14 F.3d 321, 324 (7th Cir. 1994)**; ***Town of Munster v. Sherwin Williams Co.*, 27 F.3d 1268 (7th Cir. 1994)**; ***Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993)**. All of these cases, however, merely assume, without explicitly deciding, that a responsible party can file such a cause of action. However, "[a] point of law merely assumed in an opinion, not discussed, is not authoritative." ***In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989).**

Cerro is a responsible party in this action. Monsanto has met its burden of showing that Cerro is at least partly responsible for the hazardous waste found in DCA. Cerro did not adequately respond to the proof of this material fact. Cerro merely stated that "Cerro does not concede that it is a liable party under CERCLA" (Doc. 137 at 2). This simple assertion does not defeat summary judgment. Therefore, Cerro, a responsible party, has a claim for contribution, which claim is appropriately filed under Section 113, not Section 107.

Because Cerro's claim is one for contribution, not cost recovery, Monsanto's Motion for Summary Judgment as to Counts I and II (Doc. 128) is hereby **GRANTED.**

D. Count III: Contribution

Perhaps with the knowledge that its claims against Monsanto are really for contribution, Cerro also filed Count III for contribution under Section 113(f) of CERCLA, **42 U.S.C. § 9613(f)**. Monsanto moved for summary judgment of Count III of Cerro's amended complaint.[2] Monsanto argues that summary judgment is appropriate because: (1) Section 113 actions must comply with the National Contingency Plan (NCP); (2) Cerro's clean up of DCA was a remedial action, not a removal action as defined by CERCLA; (3) Cerro did not comply with the NCP requirements for remedial actions, namely those for public notice and study; and (4) even if the clean up was a removal action, Cerro did not comply with the NCP requirements for removal actions, namely the evaluation and community relations requirements.

---

[2] Because Monsanto's motion for summary judgment as to Counts I and II was granted in Part C of this Order, we treat Monsanto's motion for summary judgment as to Counts I, II and III as one directed only to Count III.

First, any clean-up costs incurred by a plaintiff must be consistent with the NCP to give rise to a right to contribution under Section 113. 9 ***County Line Investment Co. v. Tinney,*** **33 F.2d 1508, 1516 (10th Cir. 1991).** The record reveals genuine issues of material fact which preclude summary judgment. In response to the motion for summary judgment (Doc. 92), Cerro has produced materials supporting its contention that genuine issues of material fact remain. For instance, Cerro presents the E&E report and the Avendt study as support for its contention that the clean up was a removal action. Other issues of material fact include whether Cerro complied with the NCP.

Therefore, there are disputes "over facts which might affect the outcome of the suit." ***Tregenza v. Great American Communications Co.*****, 823 F. Supp. 1409, 1411 (N.D. Ill. 1993).** Summary judgment is inappropriate. Accordingly, Defendant Monsanto's Motion for Summary Judgment as to Count III (Doc. 81) is hereby **DENIED.**

E. Counts IV and V: Illinois Common Law Claims

In Counts IV and V of its amended complaint, Cerro asserts the Illinois common law theories of ultrahazardous activity and private nuisance. Monsanto filed a motion for summary judgment claiming, among other things, that Counts IV and V are time-barred by the Illinois statute of limitations governing such claims. Illinois law provides that actions to recover damage to property must be commenced within five years after the cause of action accrued. **735 ILCS 5/13-205.** A cause of action accrues when the plaintiff knew or should have known of the injury. ***Lincoln Way Community College v. Village of Frankfurt,*** **367 N.E.2d 318, 324 (Ill. App. Ct. 1977).** "For

continuing violations ... the five-year statute of limitations merely specifies a window in time for which monetary damages may be recovered prior to the filing of the complaint." ***Meyers v. Kissner*, 594 N.E.2d 336, 340 (7th Cir. 1992).**

Cerro filed its complaint on April 8, 1992. Thus, claims for injuries occurring prior to April 8, 1987, are time-barred. Monsanto asserts that it did not injure the Plaintiff's property during the five years prior to Cerro's filing of this lawsuit. Monsanto further states that it could not have committed an ultrahazardous activity or a private nuisance after April 8, 1987, because water flowing from the Village sewer did not contain any of Monsanto's industrial effluent. Monsanto ceased producing PCBs and dismantled its PCB production facility in 1977. Furthermore, Monsanto built a 42 inch sewer in 1986 which took all of Monsanto's wastewater out of the Village sewer.

In response to Monsanto's summary judgment motion on Counts IV and V, Cerro bears the burden of coming forward with evidence that a triable issue of fact remains. ***Celotex*, 477 U. S. at 324**. The evidence supporting Cerro's position "must be sufficiently strong that a jury could reasonably find" for Cerro. ***Walker v. Shansky*, 28 F.3d 666, 670-71 (7th Cir. 1994)**. On the issue at hand, Cerro has tendered nothing to controvert Monsanto's evidence regarding the dates of any potentially ultrahazardous activity or private nuisance affecting Cerro's property.

Plaintiff Cerro has failed to sustain its burden. No disputes remain "over facts which might affect the outcome of the suit." Accordingly, Monsanto's motion to dismiss Counts IV and V (Doc. 84) is hereby **GRANTED**.

IT IS SO ORDERED.

DATED this 31st day of March, 1995.

PAUL E. RILEY
United States District Judge